QUESTION PRESENTED

Whether two police officers violated the Fourth Amendment when, as a routine practice unprovoked by any suspicion, they boarded an interstate bus during a scheduled stop and, while the door to the bus was closed and one officer carried a pistol in his hand and partially blocked the aisle, questioned respondent and obtained permission to search his luggage.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1717

STATE OF FLORIDA,

Petitioner

v.

TERRANCE BOSTICK,

Respondent

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF RESPONDENT

STATEMENT

On the morning of August 27, 1985, Detective Joseph Nutt and Officer Steven Rubino, wearing green "raid jackets" bearing the name and insignia of the Broward County Sheriff's Department, boarded a Greyhound bus at the bus station in Fort Lauderdale, Florida. J.A. 9. The bus was making a brief scheduled stop to pick up passengers and freight before continuing on its Miami-to-Atlanta route. J.A. 54. Detective Nutt was the first one to board the bus, carrying in his hand a zippered pouch containing a pistol. J.A. 14, 28. Officer Rubino followed, with his firearm concealed in his waistband. J.A. 22, 28. When the officers boarded the bus, the bus driver left

the vehicle and closed the door behind him. J.A. 53-54, 57, 62.[1]

Without asking permission from the bus driver or making any general announcement to the bus passengers, the officers proceeded directly to the back of the bus, where respondent Terrance Bostick was lying on the rear seat with his head on a red tote bag.[2] J.A. 10-11, 28, 35.

[1] As confirmed in a telephone conversation with counsel for petitioner, petitioner does not dispute that the bus driver left the bus, closing the door behind him, immediately following the boarding by the officers, and that the door remained closed until he reboarded some time later, during or after the search of the blue bag. These facts are clear from the deposition of the driver, George A. Black, J.A. 51, 53-54, 57, which was filed with the trial court following the suppression hearing. That deposition is contained in the trial court case file, with the handwritten notation on the cover, "filed in open court 6/11/86." While the record in the Florida appellate and Supreme courts contains a transcript of neither the trial court proceedings on June 11, 1986 nor the Black deposition itself, it does contain Bostick's Supplemental Memorandum to the trial court, summarizing the relevant aspects of the driver's deposition, which is described in the memorandum as having been "submitted in evidence." J.A. 61-63. The State does not dispute that this Court may treat the deposition as part of the record.

[2] As noted in the Amicus Brief of the United States at 10 n.2, the trial court's reliance on a form order denying the motion to suppress, J.A. 2, leaves doubt as to the factual assumptions underlying the ruling. In particular, there is no way to determine with certainty the trial judge's view as to whether Bostick was awakened by the officers or otherwise touched by them, whether the officers asked if Bostick had "a minute" to talk before requesting his driver's license and bus ticket, whether Detective Nutt had his gun pouch open and his hand on his gun, where Officer Rubino was standing during the exchange, and whether Bostick was advised of his right to refuse to consent to the search of his blue bag.

Bostick testified that he "was sleeping" when he "felt someone touching [him] on [his] feet," at which time Detective Nutt asked him if he had a bus ticket and identification. J.A. 35-36, 41. Detective Nutt, in contrast, stated that Bostick "was leaning over in a comfortable position. He wasn't sleeping because I introduced myself and he responded back to me." J.A. 15. Officer Rubino described Bostick as "[l]eaning on an elbow half sitting and half lying . . . I don't remember him sleeping." J.A. 28-29. On three of the four occasions when the officers described the initial contact with Bostick, they did not mention any preliminary question as to whether Bostick had time to talk with them. J.A. 10, 11-12, 30. On one occasion, during cross-examination, Nutt said that, as he displayed his own credentials, he asked Bostick if he had "a minute to speak with us." J.A. 15.

As to the gun carried by Detective Nutt, the officers stated that it was carried in a small black pouch in Nutt's hand. J.A. 9, 14, 28. Bostick stated further that during part of the encounter Nutt had his hand on the gun, inside the unzipped pouch. J.A. 41. Nutt testified that he usually kept the pouch zipped, acknowledging, firearm." J.A. 15. He could not recall whether he had had his hand though, that there "have been many times I had a hand on the directly on the weapon in this instance. J.A. 14-15. *See* J.A. 28.

The two officers offered conflicting accounts of Officer Rubino's position during the confrontation with Bostick. According to Detective Nutt, Officer Rubino was standing "[b]ehind me further toward the front of the bus." J.A. 10. However, Officer Rubino stated that he stood "off the aisle in front of the seat" immediately ahead of Bostick's seat, and that Detective Nutt stood next to him, half in front of the seat and half in the aisle. J.A. 22, 31.

As to the issue of whether Bostick was told he need not consent to a search of his bag, the officers described the sequence of events concerning that search a total of five times. On four of those occasions, they made no mention of any such statement. J.A. 10, 23-24, 29, 33. On one other occasion, during cross-examination, Detective Nutt testified that he told Bostick prior to the search of the blue bag that he had a right to refuse to consent. J.A. 20. Bostick denied that such a statement was made at any time. J.A. 37. The Florida Supreme Court rephrased the question presented so as to eliminate the premise that Bostick was advised of his right to refuse consent. Pet. App. 41.

Respondent submits that affirmance of the decision below is required on the limited facts set out in the decision of the Florida Supreme Court, Pet. App. A2, without resolution of those issues on which the record is controverted. However, in the event that the Court should find the unresolved facts to be potentially dispositive, respondent submits that the writ of certiorari should be dismissed as improvidently granted, on the ground that the record is not

The pouch in Detective Nutt's hand was recognizable as containing a pistol, Pet. App. A2, and Bostick was aware

of the gun when he was first approached. J.A. 37-38, 47-48. The record does not indicate that either officer ever informed Bostick that he did not have to answer their questions. The officers had no reasonable suspicion of criminal activity by anyone on the bus. J.A. 13, 26.

Detective Nutt stationed himself in front of Bostick's seat, in a manner that partially blocked the aisle, with Officer Rubino located nearby. J.A. 10, 22, 31. *See supra* note 2. After displaying his Sheriff's Department badge and identification, Detective Nutt asked Bostick's destination. J.A. 10. Bostick replied that he was traveling to Atlanta. J.A. 10. Detective Nutt then requested his bus ticket and identification, which Bostick promptly handed to Nutt for his perusal. J.A. 10. Nothing about Bostick's ticket or driver's license gave the officers any reason to suspect him of wrongdoing, and the documents were returned. J.A. 17.

Detective Nutt then asked Bostick whether the red tote bag, which he was using as a pillow, could be searched for drugs. J.A. 10. After looking for approval to another passenger, to whom the bag belonged, Bostick handed the bag to Nutt, who searched it without finding any contraband. J.A. 10, 37. Detective Nutt then asked for and received Bostick's permission to search a blue bag that Officer Rubino had found on the overhead rack. Pet. App. A2; J.A. 10, 19-20, 23-24.[3] This search yielded a quantity of cocaine. J.A. 10.

"sufficiently clear and specific to permit decision of the important constitutional questions involved in this case." *Massachusetts v. Painten*, 389 U.S. 560, 561 (1968).

[3] Bostick testified that he did not consent to the search. J.A. 44. As stated by the Florida Supreme Court, Pet. App. A2, however, this factual issue was necessarily resolved against him in the trial court's order denying the motion to suppress. While the circumstances surrounding any such consent raise serious questions as to its voluntariness, *see infra* note 24, respondent does not here challenge the conclusion that a verbal consent was given.

The officers then placed Bostick under arrest and removed him from the bus. J.A. 10-11. As a result of the encounter and arrest, the bus was delayed more than twenty minutes in leaving Fort Lauderdale. J.A. 56, 58, 62.

Bostick was charged with trafficking in cocaine in violation of Florida law. He moved to suppress the cocaine found in the blue bag on the ground, *inter alia*, that his purported consent to the search of the bag was "the result of coercion and the intimidating circumstances surrounding the bus boarding." J.A. 3.

The trial judge conducted a hearing on the suppression motion on March 24, 1986. After listening to the testimony of the two police officers and Bostick, the judge withheld his ruling, but commented that the officers' testimony that Bostick voluntarily agreed to the search "does really stretch the imagination when they're standing there in an aisle and talking to someone and just checking all the bags. It's very intimidating even if there is consent." J.A. 49.[4]

On August 4, 1986, the trial judge issued a one-sentence order summarily denying the motion to suppress. J.A. 2. He issued no findings of fact or conclusions of

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[4] As noted in the Amicus Brief of the United States at 4, the trial judge also stated that "the police do have a right—and I guess you and I would, too—we can step on a bus and walk up and talk to somebody and say, can we check your bag. I don't know if that's contrary to any law, is it?" It is doubtful whether this statement can fairly be treated as the basis of the judge's decision denying suppression, since it was made in the course of the argument of the motion, more than four months before the decision was rendered, and suggests by its own terms that the judge had not yet finally resolved the issue in his own mind. Moreover, the statement was made in conjunction with the judge's observations about the intimidating circumstances facing Bostick. In any event, the stated conclusion is a legal rather than a factual one, and is closely related to the ultimate issue of law in this case—whether a seizure took place. *See* Amicus Brief of the United States at 10 n.2.

law in support of the order. Bostick pleaded *nolo contendere* to the cocaine charge, preserving his right to appeal the denial of the suppression motion. *See* Fla. R. App. P. 9.140(b) (West 1990).

A divided panel of the Florida Court of Appeal for the Fourth District affirmed without opinion. Pet. App. B1. The dissenting judge declared that he was "uncomfortable" with the search of Bostick's bag, which he found irreconcilable with this Court's decision in *Florida v. Royer*, 460 U.S. 491 (1983). Pet. App. B3. On petition for rehearing, the Court of Appeal certified to the Florida Supreme Court the question whether the search of Bostick's bag was permissible. Pet. App. B1-B2.[5]

The Florida Supreme Court reversed. Pet. App. A1. After modifying the question presented to omit the premise that Bostick was advised of his right to refuse consent,[6] the court held that the police officers had illegally detained Bostick prior to the search of his luggage, because a reasonable person would not have felt " 'free to disregard the questions and walk away' " in such circumstances. Pet. App. A8. (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.)). In support of this conclusion, the court emphasized that the officers had worn identifying clothing; that Nutt appeared to be carrying a gun and stood in a position partially blocking

[5] The specific question certified by the Court of Appeal (Pet. App. B1-B2) was:

> May the police without articulable suspicion board a bus and ask at random, for, and receive consent to search a passenger's luggage where they advise the passenger that he has the right to refuse consent to search?

[6] The rephrased question considered by the Florida Supreme Court (Pet. App. A1) was:

> Does an impermissible seizure result when police mount a drug search on buses during scheduled stops and question boarded passengers without articulable reasons for doing so, thereby obtaining consent to search the passenger's luggage?

the aisle; and that Bostick "could not leave the bus" given its imminent departure for Atlanta and therefore had "only the confines of the bus in which to move about." Pet. App. A8. The court went on to conclude that Bostick's subsequent consent to the search of his luggage did not overcome the taint of the illegal detention. Pet. App. A9.

The three dissenting justices, while voting to uphold the trial court's ruling, also expressed "a certain amount of discomfort in the prospect of the police routinely boarding stopped buses to inquire of the passengers whether they will consent to a search of their luggage." Pet. App. A13. However, the dissenters would have deferred to the trial judge's apparent decision that the consent to search was voluntarily given in the circumstances of this case. Pet. App. 12, 15.

SUMMARY OF ARGUMENT

An individual is "seized" within the meaning of the Fourth Amendment whenever a police officer, "by means of physical force or show of authority, has in some way restrained [his] liberty." *Terry v. Ohio*, 392 U.S. 1, 20 n.16 (1968). In assessing whether a particular individual's liberty has been restricted in an encounter with the police, the Court inquires whether, in view of all of the surrounding circumstances, "a reasonable person would have believed he was not free to leave if he had not responded" to the officer's inquiries. *INS v. Delgado*, 466 U.S. 210, 216 (1984); *see also Florida v. Royer*, 460 U.S. 491, 502 (1983) (plurality opinion); *id.* at 511-12 (opinion of Brennan, J.).

A reasonable passenger would not have felt free to leave the Greyhound bus in Fort Lauderdale after having been confronted by the two police officers. The officers made a visible "show of authority" as they entered the bus, wearing "raid jackets," flashing badges, and carrying what appeared to be (and, in fact, was) a gun. They

made no announcement of the routine character of their inquiries, nor did they inform the passengers that they were free to leave or to decline to answer any questions. Indeed, the passengers would have received just the opposite impression from the bus driver's closing the door of the bus following the entrance of the officers.

The bus was supposed to be making only a brief stop before traveling on to Atlanta. Any passenger who left the bus would therefore risk being stranded in an unfamiliar city, possibly without baggage that might remain locked away in the luggage compartment. He would also have attracted the scrutiny of the police, as well as his fellow passengers, had he engaged in conduct so contrary to his apparent self-interest.

Nor could a passenger have distanced himself from the officers while remaining on the bus. A bus is a small, confined space that affords passengers little room in which to move about. A passenger could not have attempted to do so without attracting the officers' attention. Moreover, the officers at least partially blocked the aisle, standing between Bostick and the closed door of the bus. A reasonable person who found himself in such a small, enclosed area, confronted by two police officers, would not have felt free to walk away and terminate the interview. *See Florida v. Royer*, 460 U.S. at 502-03. Bostick was therefore seized within the meaning of the Fourth Amendment.

The State of Florida and *amicus curiae* United States do not dispute that the officers had no reason to suspect Bostick of any wrongdoing until after the search of his blue bag. Nor do they attempt to justify the officers' actions on the basis of a special law-enforcement necessity that outweighs the intrusiveness of the detention they entail. It therefore follows that Bostick was unreasonably seized in violation of the Fourth Amendment.

Assuming that Bostick was illegally seized, the cocaine found during the search of his bag must be suppressed as

"fruit of the poisonous tree." The State and the United States do not contest that conclusion. There was no intervening "independent act of free will," *Florida v. Royer*, 460 U.S. at 501, that even arguably separated Bostick's seizure from his consent to the search. The connection between these two events therefore cannot be considered " 'so attenuated as to dissipate the taint' " of the illegal detention. *Wong Sun v. United States*, 371 U.S. 471, 491 (1963) (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939)).

ARGUMENT

I. THE OFFICERS' CONDUCT CONSTITUTED AN UNREASONABLE SEIZURE OF BOSTICK WITHIN THE MEANING OF THE FOURTH AMENDMENT

This case presents a particularly aggravated instance of a scenario that has unfolded with increasing frequency in recent years: the boarding of buses by armed law-enforcement officers to question and search the persons and possessions of passengers as to whom they have no pre-existing information or reasons for suspicion. This practice is highly intrusive, especially on the particular facts before the Court, because it is likely to instill in travelers the sense that they have no reasonable option but to acquiesce in the officers' requests. Under the circumstances here present, the confrontation constituted a seizure, which was unreasonable because not predicated on any articulable suspicion or any plausible basis in law-enforcement necessity or practice.

A. Bostick Was Seized Because a Reasonable Person in His Position Would Not Have Felt Free to Terminate the Encounter and Walk Away

If the Fourth Amendment is to protect that most basic of individual rights—the "right to be let alone," *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)—its prohibition against unreasonable seizures must reach not only the obvious, but also the

more subtle ways that one can be intentionally confined by law-enforcement action. In its "totality of the circumstances" approach to identifying seizures, *see United States v. Mendenhall*, 446 U.S. 544, 557 (1980) (opinion of Stewart, J.); *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973), this Court has recognized that liberty may be constrained by official displays of authority lacking either a direct and unambiguous physical restraint or a verbal directive explicitly curtailing liberty. The test is not whether the police have expressly effected an arrest or detention, either by word or deed, but whether "a reasonable person would have believed he was not free to leave." *INS v. Delgado*, 466 U.S. at 216; *see also Florida v. Royer*, 460 U.S. at 502 (plurality opinion); *id.* at 511-512 (opinion of Brennan, J.); *United States v. Mendenhall*, 446 U.S. at 554 (1980) (opinion of Stewart, J.).

Even apart from the aggravated circumstances of this case, the basic police practice of boarding buses in midjourney to engage in ad hoc questioning of previously unidentified and unsuspected persons may be highly coercive.[7] While officers may approach an individual on the street and ask if he is willing to answer some questions, *Florida v. Rodriguez*, 469 U.S. 1, 5-6 (1984); *Dunaway v. New York*, 442 U.S. 200, 210 n.12 (1979), when

[7] Faced with situations often much less compelling than those presented here, numerous judges have struck down bus encounters absent pre-existing grounds for suspicion, on the basis that a reasonable person would not feel "free to leave" when confronted by police officers within the confines of a bus. *See, e.g., United States v. Madison*, 744 F. Supp. 490, 496 (S.D.N.Y. 1990); *United States v. Chandler*, 744 F. Supp. 333, 335-36 (D.D.C. 1990); *United States v. Alston*, 742 F. Supp. 13, 15-16 (D.D.C. 1990); *United States v. Felder*, 732 F. Supp. 204, 207-08 (D.D.C. 1990); *United States v. Cothran*, 729 F. Supp. 153, 155-56 (D.D.C. 1990), *rev'd*, No. 90-3034, slip op. (D.C. Cir. Dec. 21, 1990); *United States v. Lewis*, 728 F. Supp. 784, 786-87 (D.D.C. 1990), *rev'd*, No. 90-3029, slip op. (D.C. Cir. Dec. 21, 1990); *People v. Camacho*, N.Y. Law J., Sept. 7, 1990, at 18, col. 3; *see also United States v. Grant*, 734 F. Supp. 797, 802 (E.D. Mich. 1990) (seizure on airplane).

carried out within the confines of a bus at an intermediate stopping point, this practice has the quality of a dragnet. Travelers may feel compelled to cooperate with the police, even if they might rather not, in order to avoid the risk of unhappy consequences.

The approach will often be made in a city unfamiliar to the passenger, usually a city where, because it is an intermediate stop on his journey, he had not intended presently to spend time. Especially for those of limited financial resources or limited education, many of whom use buses as a means of long-distance transportation,[8] leaving the bus to escape the officers' presence is likely to be at best a disfavored option.[9] It may also, on other

[8] *See* L. Cunningham & K. Thompson, *The Intercity Bus Tour Market*, J. Travel Res., Fall 1986, at 8 ("Research studies . . . have concluded that intercity bus ridership consists basically of either those less than 24 years of age or those over 65. Ridership typically includes a disproportionate number of low-income individuals."); *see also* J. Bolt, *Greyhound Takes to Radio for Summer Ad Campaign*, Associated Press, May 3, 1990 (available on NEXUS) ("Greyhound says its passengers tend to be students or from low-income families").

[9] A number of lower federal courts have recognized that a reasonable bus passenger would be particularly reluctant to walk away from an encounter with the police at an intermediate point in his journey, thereby risking "being stranded in a city which he had no intention of visiting and in some cases missing the opportunity to take a bus to his intended destination." *United States v. Madison*, 744 F. Supp. at 496; *see United States v. Grant*, 734 F. Supp. at 802. The United States urges the Court to disregard such arguments because "[t]o the extent that a reasonable person would not have felt free to leave the bus, that was not because of the officers' conduct, but because the bus was soon to depart." Amicus Brief of the United States at 20-21.

The United States ignores the fact that the officers purposefully chose to question persons who were already seated on a bus that was about to depart—as opposed, for example, to persons who were waiting in bus stations or disembarking from buses—presumably because they knew that such persons would be constrained by time and money, among other concerns, from walking away from the encounter. The confining effect of police conduct is to be evaluated

grounds, reasonably appear to be impractical or even impossible. For example, a person's luggage may be stored away in the baggage compartment, or the bus driver may have taken his ticket, thus eliminating the option of taking a different bus.[10] Or the exit from the bus may be blocked by people or a closed door, or departure may appear to be inconsistent with the intentions of the inquiring officer.

Further, while a person's mere refusal to respond to police inquiries cannot "without more" provide reasonable suspicion of wrongdoing, *Florida v. Royer*, 460 U.S. at 498, a person's engaging in actions contrary to his own apparent self-interest (*e.g.*, leaving an inter-city bus whose departure is imminent) might provide some or all of the objective basis necessary for an investigative detention.[11] A reasonable person could thus conclude that

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not in a context isolated from the actions and concerns of those acted upon, but in the actual context reasonably foreseeable to the officer. Thus, for example, police conduct in erecting a concealed barricade in the road to stop a fleeing thief may be actionable as an unreasonable seizure, even though it was the thief's predictable action of driving into it that resulted in his "seizure" and death. *Brower v. County of Inyo*, 109 S. Ct. 1378 (1989).

[10] The passenger's situation would thus be similar to that of a person whose ticket had been retained by the police. *See Florida v. Royer*, 460 U.S. at 501, 503-04 & n.9. If the passenger attempted to retrieve his ticket or checked luggage from the bus driver--assuming that the driver remained with the bus, which he did not in this case--the police might deem such conduct to warrant further scrutiny.

[11] Indeed, even a passenger who does nothing more than refuse to talk to the police while remaining on the bus may invite renewed police overtures at later stops along the route. *See United States v. Felder*, 732 F. Supp. at 205 (officer testified that "when passengers who appear nervous refuse to consent to an interview, certain members of his unit then take it upon themselves to notify authorities at the next stop"); *United States v. Cothran*, 729 F. Supp. at 156 (officer testified that, when passengers refused to permit a search of their luggage, he would sometimes notify authorities at the next stop to subject the passengers to further scrutiny).

some response to police inquiries will ultimately be necessary, regardless of whether he initially agrees to talk or seeks to avoid the encounter. In that sense, the bus context differs from confrontations on the street, *Michigan v. Chesternut*, 108 S. Ct. 1975 (1988), in an airport concourse, *United States v. Mendenhall*, 446 U.S. 544, or in a factory, *INS v. Delgado*, 466 U.S. 210, where "the location provided ample opportunities for the individuals to leave the presence of the officers without engaging in an act which would be contrary to their interests or raise a reasonable suspicion." *United States v. Madison*, 744 F. Supp. 490, 494 (S.D.N.Y. 1990).

The close confines of a bus present a factor of major importance, because passengers are afforded little room to move about and no effective way to escape the attentions that the officers may direct their way. The bus setting thus contrasts sharply with the workplace setting in *INS v. Delgado*, 466 U.S. at 213, where the Court noted that employees were free to walk around the entire factory to avoid the INS agents.[12] A bus is more reminiscent of the small, confined office in which the subject was detained in *Florida v. Royer*, 460 U.S. at 502.

These circumstances, which are typically present in inter-city bus boardings, are aggravated by additional facts present here that would clearly have discouraged a reasonable person from attempting to leave or break off

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[12] The United States contends that the restrictive setting of a bus encounter cannot, without more, support a determination that an individual was not "free to leave" because the individual had already "voluntarily placed himself in that restrictive environment." Amicus Brief of the United States at 21 n.13 (citing *INS v. Delgado*, 466 U.S. at 218). The United States' argument entirely ignores the fact that the officers deliberately decided to act on this captive audience, presumably because they believed that their inquiries would be more fruitful if conducted in the restrictive confines of the bus rather than, for example, in the bus station. *See supra* note 9.

the encounter. The officers made a particularly visible show of official authority, *Terry v. Ohio*, 392 U.S. at 20 n.16, and of their ability to use force if necessary to control the situation. Detective Nutt carried a pistol, which was recognizable inside the pouch that he held in his hand. Pet. App. A2; J.A. 37-38, 47-48. *See United States v. Mendenhall*, 446 U.S. at 554 ("the display of a weapon by an officer" is one factor suggesting that a reasonable person might not have felt free to leave). Moreover, both officers wore not merely uniforms, but "raid jackets," which the television-viewing public has come to associate with police strikes on scenes of criminal activity. In contrast, the officers in *Royer* and *Mendenhall* wore plainclothes and carried no visible firearms. *See Florida v. Royer*, 460 U.S. at 493; *United States v. Mendenhall*, 446 U.S. at 555.[13]

And once the police officers approached Bostick in the rear of the bus, they stood between him and the exit,[14] thereby at least partially blocking his only route to the door of the bus. Bostick was thus " 'in a small enclosed area being confronted by two police officers—a situation which presents an almost classic definition of imprisonment.' " *Florida v. Royer*, 460 U.S. at 496 (quoting *Royer v. Florida*, 389 So.2d 1007, 1018 (Fla. App. 1980)).

[13] In recently reversing suppression orders in decisions of the District Court for the District of Columbia in *United States v. Cothran*, 729 F. Supp. 153 and *United States v. Lewis*, 728 F. Supp. 784, the District of Columbia Circuit distinguished those cases from this one on the ground that a reasonable bus passenger would not "find his 'business' impeded by the officers' questioning. The officers neither wore badges nor carried visible weapons. *Compare Bostick v. State*, 554 So.2d 1153, 1154, 1157 (Fla. 1989) . . . ." *United States v. Lewis*, No. 90-3029, slip op. at 10.

[14] It is undisputed that Detective Nutt was standing partially in the aisle in front of Bostick's seat. As noted above, *supra* note 2, the officers' testimony diverges as to whether Officer Rubino was standing in the aisle behind Detective Nutt or in front of the seat ahead of Bostick's seat. Both positions would discourage an attempted departure.

Indeed, the bus was made even more confining by the driver's closing its only door after the officers boarded. It is questionable whether a typical bus passenger would know how to operate such a door or would be likely to attempt to do so in the driver's absence. Any passenger who had wished to leave the bus during the officers' visit might therefore have had some difficulty doing so, even if he had gotten past the officers.

The police questioning here was not introduced by a statement that the procedure was routine and not based on any particular information. The questioning thus could be expected to cause a passenger concern or even alarm at the prospect that he or others on board were suspected of criminality. *See Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481, 2486-87 (1990); *United States v. Martinez-Fuerte*, 428 U.S. 543, 558-59 (1976). Further, as in *Royer*, Bostick "was never informed that he was free to [depart] if he so chose." *Florida v. Royer*, 460 U.S. at 503; *see also id.* at 501.[15] The officers thus failed to take a simple precaution that, as this Court has previously indicated, "may have obviated any claim that the encounter was anything but a consensual matter from start to finish." *Id.* at 504; *cf. Schneckloth v. Bustamonte*, 412 U.S. at 227 (a person's "knowledge of the right to refuse consent is one factor to be taken into account" in determining whether his consent was voluntary).

The officers' conduct thus conveyed to the reasonable passenger—indeed, it appears to have been calculated to convey—the message that he would not necessarily be allowed "to disregard the questions and walk away." *United States v. Mendenhall*, 446 U.S. at 554.

[15] As this Court's *Royer* decision demonstrates, police officers do not indicate that an individual is free to depart merely by asking at the outset whether he will talk with them. In *Royer*, as here, the officers claimed to have initiated the encounter by inquiring whether the person "had a moment to talk." *Royer v. Florida*, 389 So.2d 1007, 1016 (Fla. App. 1980). *See supra* note 2.

Presumably recognizing the obstacles that would discourage a reasonable person from trying to leave a bus in these circumstances, the State and the United States suggest that the Court should undertake a totally new inquiry, focusing not on whether a reasonable person would have felt free to walk away but rather on whether he would have felt free to terminate the encounter while remaining on the bus.[16] Brief of Petitioner at 14-15; Amicus Brief of the United States at 22. This argument fails to recognize that, so long as the individual and the police remain in close proximity to each other within a confined space, the encounter cannot be considered truly over. And a reasonable person would not have felt free to simply stonewall the officers' inquiries, because the officers' conduct gave substantial reason for question about how the officers would respond.

A refusal to cooperate voluntarily might reasonably be viewed as likely to provoke continuing inquiries by the officers, resulting at least in significant embarrassment and perhaps culminating in forcible detention of either the individual or the entire bus. The officers gave no reason to believe that the entire bus would not be held, briefly or indefinitely, pending resolution of their curiosity. The officers' free rein on the bus, after boarding without securing the driver's consent, demonstrated their apparent authority to detain it, which by itself gave them substantial coercive power over the passengers.[17]

[16] The United States' suggestion that a passenger could have avoided the officers' scrutiny by secreting himself in the restroom, Amicus Brief of the United States at 18, is particularly specious. Because such conduct would clearly appear to be an effort to avoid police attention, and because the police are well aware that illicit drugs are often disposed of by flushing them down toilets, an individual who remained in the restroom for a prolonged period would only be inviting closer police scrutiny.

[17] The United States suggests that the fact that the bus was due to depart soon rendered the encounter less coercive, because Bostick had the option of simply waiting out the officers and waving goodbye to them as the bus made its scheduled departure. Amicus Brief of the United States at 21. This might be a reasonable strategy if one could be sure that his wishes to be left alone would be respected and that the bus would not, on that account, be held up. It is not, however, a reasonable course for one in these circumstances to pursue, precisely because the officers' intentional conduct raises a serious question about what their response might be.

Even if neither the bus nor its passengers were further detained as a result of failure to cooperate, a traveler might expect to be the object of continued surveillance and questioning at future intermediate stops or at his final destination.

These appear to be real possibilities, not just to a person with an overactive imagination or a guilty conscience, but to anyone, *because of the way the police in this case conducted themselves.* The officers' show of authority, interrupting Bostick's rest with an unqualified request for information and documents, supported by a firearm visibly in hand, conveyed their determination to secure compliance. The close confines of the bus, the officers' physical interposition of themselves between Bostick and the exit, and the fact that the door was closed made the option of removing oneself from the encounter at best a highly speculative gauntlet that only a person with something to hide would even consider running.[18]

B. Bostick's Detention Was Unreasonable

A seizure violates the Fourth Amendment only if it is determined to be "unreasonable." The facts of this case strike a familiar chord with most Americans, not because they have personally experienced this scenario, but precisely because they have not. The image of police officers asking passengers for their "papers," and subjecting them to ad hoc inquiries, is one that we have been

[18] The officers' behavior on board the bus in creating a sense of confinement and constraint is not made less offensive by the fact that the coercive effect arises in part from the obvious preference of an inter-city bus passenger to stay on board the bus, if possible, until he reaches his destination. *See supra* note 9; Amicus Brief of the United States at 22.

fortunate to regard as an abhorrent creature of authoritarian regimes. *See* Pet. App. A11. These encounters are unreasonable, most fundamentally, because they do not fit with most Americans' sense of how they are supposed to be dealt with by their Government.[19]

More specifically, "the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against 'an objective standard,' whether this be probable cause or a less stringent test." *Delaware v. Prouse*, 440 U.S. 648, 654 (1979) (citations omitted). In the case of relatively brief investigative detentions of the sort presented here, the test recognized by this Court is whether the officer "has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot.'" *United States v. Sokolow*, 109 S. Ct. 1581, 1585 (1989) (citing *Terry v.*

[19] In addition to the numerous judges who have found such practices impermissible, *see supra* note 7, many of those who have found no constitutional offense have nonetheless noted their personal uneasiness with the practice. The trial judge in this case characterized bus encounters as "very intimidating," J.A. 49, and the three dissenting justices on the Florida Supreme Court "admit[ted] to a certain amount of discomfort in the prospect of the police routinely boarding stopped buses to inquire of the passengers whether they will consent to a search of their luggage." Pet. App. A13.

In *United States v. Fields*, 909 F.2d 470, 473 (11th Cir. 1990), the court stated that it was "disturbed" by the "thoughtful opinions" of other courts invalidating such practices, but was nonetheless obligated to follow Eleventh Circuit precedent. *See also United States v. Hammock*, 860 F.2d 390, 393 (11th Cir. 1988) (recognizing that "actions by law-enforcement officers that would not constitute an arrest in, for example, an airport environment, might constitute an arrest when used to interdict drug couriers traveling by bus because of the inherent limitations on a bus passenger's freedom of movement") (citations omitted).

Perhaps most telling of all is the amicus brief in this case by the Americans for Effective Law Enforcement ("AELE"), a pro-law-enforcement organization that has filed 85 previous briefs with this Court, all of them supporting the position of law enforcement. AELE comes forward here to support the ruling below that the police conduct constituted an unreasonable seizure of Bostick.

Ohio, 392 U.S. at 30). No such reasonable, articulable suspicion existed in this case prior to the officers' completion of their search of the blue bag. *See* Pet. App. A9; J.A. 13, 17; *see also* Amicus Brief of the United States at 10 ("the police officers had no reason to suspect that respondent was carrying illegal drugs"). The detention was therefore unreasonable under the objective standard articulated by this Court.

There can be no justification in these circumstances for allowing the detention of Bostick in the absence of reasonable suspicion. This is not an instance where, in the presence of a "special governmental need[], beyond the normal need for law-enforcement," an intrusion may be approved without any predicate of individualized suspicion, upon a balancing of "the individual's privacy expectations against the Government's interests." *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1390 (1989). To be sure, "the public has a compelling interest in identifying by all lawful means those who traffic in illicit drugs for personal profit." *Florida v. Royer*, 460 U.S. at 508 (Powell, J., concurring). But this interest does not justify subjecting individuals to suspicionless searches and seizures except in rare instances, and then only "pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown v. Texas*, 443 U.S. 47, 51 (1979); *see Michigan Dep't of State Police v. Sitz*, 110 S. Ct. at 2487 (upholding highway sobriety checkpoint program where "checkpoints are selected pursuant to the guidelines, and uniformed police officers stop every approaching vehicle"); *National Treasury Employees Union v. Von Raab*, 109 S. Ct. at 1390 (upholding drug tests required of "every employee who seeks a transfer to a covered position" where "the permissible limits of such intrusions are defined narrowly and specifically").

The requirement that law-enforcement officers act in accordance with pre-existing standards is designed to prevent individuals from being subjected to detentions or

other intrusions "at the unbridled discretion of law-enforcement officials." *Delaware v. Prouse*, 440 U.S. at 661; *see also National Treasury Employees Union v. Von Raab*, 109 S. Ct. at 1390; *United States v. Brignoni-Ponce*, 422 U.S. 873, 882-83 (1975). The Court has recognized the "grave danger that such unreviewable discretion would be abused by some officers in the field." *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976) (citing *United States v. Brignoni-Ponce*, 422 U.S. at 882-83). To allow police officers to engage in random standardless searches and seizures "'would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches.'" *Delaware v. Prouse*, 440 U.S. at 661 (quoting *Terry v. Ohio*, 392 U.S. at 22).

Further, the appearance that individual police officers are permitted to exercise such unbridled discretion may "generat[e] . . . concern or even fright on the part of lawful travelers." *United States v. Martinez-Fuerte*, 428 U.S. at 558; *see also United States v. Villamonte-Marquez*, 462 U.S. 579, 589 (1983) (awe); *Delaware v. Prouse*, 440 U.S. at 657 (anxiety); W. LaFave, *"Factualization" in Search and Seizure*, 85 Mich. L. Rev. 427, 448 (1986) (noting that a standardized-procedures rationale is most acceptable when the intrusion "(i) is not perceived by the individual affected or by others as accusatory in nature, and (ii) is not open to the possibility that it was either a consequence of arbitrary selection or the manifestation of some ulterior motive").

There is no evidence that Detective Nutt and Officer Rubino were acting pursuant to any plan or under the limitation of any guidelines or standards when they approached Bostick on the Greyhound bus.[20] For all that

[20] The State bears the ultimate burden of persuasion as to whether the evidence at issue was untainted by illegality. *Alderman v. United States*, 394 U.S. 165, 183 (1969); *see Florida v. Royer*, 460 U.S. at 500 (prosecution bore the burden of establishing that the detention was sufficiently limited in scope and duration to constitute an investigative seizure); *United States v. Mendenhall*, 446 U.S. at 557 (prosecution bore the burden of establishing that a reasonable person would have felt free to walk away from the encounter); *Brown v. Illinois*, 422 U.S. 590, 604 (1974) (prosecution bore the burden of establishing that evidence obtained after an illegal seizure was admissible).

appears from the record, the Sheriff's Department allowed officers in the field to exercise "unbridled discretion" in singling out passengers to be subjected to interrogation. Nor is there any indication that the Sheriff's Department imposed any restrictions on, for example, what the officers should say to the passengers, whether the officers should display their firearms, or where the officers should position themselves while conducting interviews.[21]

Further, it is apparent that the police can conduct "random citizen contacts," J.A. 13, with bus passengers without the element of detention and coercion present here. They could interview willing passengers before they board the bus or after they disembark at their destinations. Where passengers are asked by the bus company to disembark at intermediate points, the police could also conduct interviews with cooperating passengers outside the bus. In addition, the police could enlist the cooperation of the bus companies in conducting "canine sniffs" of passengers' baggage, or could install magnetometers at bus stations to detect the weapons that are frequently

[21] There are indications in the record that the Sheriff's Department has imposed some restrictions on officers "working the buses" since the seizure and subsequent arrest of Bostick. *See* Amicus Brief of Sheriff Nick Navarro (filed Oct. 14, 1987 in the Florida Supreme Court) at 4 (noting "substantial evolutionary changes in the procedure utilized by Broward County Deputies since the apprehension of Terrance Bostick"). These restrictions may have been in place prior to the events at issue in *United States v. Hanousek*, 800 F.2d at 391-92, which held that a bus encounter by members of the Sheriff's Department was not a seizure where, *inter alia*, the officers concealed their weapons and "remained slightly behind [the passenger's] seat so that the aisle was clear for him to leave the bus." *Id.* at 392.

carried by drug traffickers[22] and thereby discourage the use of inter-city buses to transport illegal drugs. And they could continue to board buses to detain persons whom they reasonably suspect to be drug couriers.[23] It can be no objection that these less intrusive alternatives may be less effective than the practice employed here because they lack the coercive twist of an armed on-board confrontation, for that is precisely the law-enforcement edge that the Fourth Amendment does not allow.

Accordingly, the practical restriction of Bostick's liberty while he was questioned on the bus must be deemed to have been unreasonable under the Fourth Amendment.

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[22] *See, e.g., United States v. Flowers*, 912 F.2d 707, 709 (4th Cir. 1990) (defendant's luggage contained a pistol and a large quantity of crack cocaine); *United States v. Cothran*, 729 F. Supp. at 155 (defendant's luggage contained a handgun and cocaine).

[23] Nor need the Court now exclude the possibility of police officers' ever boarding buses to interview passengers even without reasonable suspicion. There is no occasion here to determine whether it would be possible to implement a plan embodying explicit limitations on law-enforcement conduct designed to negate the coercive implications that might otherwise arise. Clearly, though, the absence of visible weapons, an announcement to passengers of the routine and voluntary nature of the encounter, the avoidance of physical contact, and other limitations could significantly alter the character of the interaction.

Further, none of this Court's decisions recognizing an array of lawful and effective means of detecting drug traffickers need or should be undermined by affirmance of the decision below. *See, e.g., Alabama v. White*, 110 S. Ct. 2412, 2417 (1990) (police may rely on anonymous informant's tips, as corroborated, to justify investigatory stop); *United States v. Sokolow*, 109 S. Ct. at 1587 (police may use "drug courier profiles" to attempt to identify drug traffickers); *United States v. Place*, 462 U.S. 697, 707 (1983) (police may conduct "canine sniffs" of baggage without reasonable suspicion); *Florida v. Royer*, 460 U.S. at 497 (police may approach any individual on the street, at an airport or in similar public places and "put questions to him if the person is willing to listen"); *see also* Amicus Brief of AELE at 10.

II. BOSTICK'S CONSENT TO SEARCH WAS TAINTED BY THE ILLEGALITY OF HIS DETENTION

A consent to search given during an illegal detention is ineffective if the consent was the result of the detention rather than "an independent act of free will." *Florida v. Royer*, 460 U.S. at 501, 507-08 (citing *Wong Sun v. United States*, 371 U.S. 471). In that instance, any evidence obtained in the course of the search must be suppressed as "fruit of the poisonous tree," regardless of whether the consent was voluntarily given.[24] *Id.* at 501; *Brown v. Illinois*, 422 U.S. 590, 602 (1974); *cf. Dunaway v. New York*, 442 U.S. at 217 (statements that are deemed voluntary under the Fifth Amendment although made during an illegal arrest must nonetheless be suppressed under the Fourth Amendment if obtained by exploitation of the illegality of the arrest). In assessing whether a statement made after an illegal detention is the product of "an independent act of free will," courts are to consider such factors as the "temporal proximity" of the two events and "the presence of intervening circumstances." *Brown v. Illinois*, 422 U.S. at 603.

Here, the police officers obtained Bostick's consent to the search of the blue bag in the course of an unreasonable seizure. The officers' foray onto the bus was a purposeful quest for evidence, with the coercive environment that they created as their principal tool. *See Dunaway v. New York*, 442 U.S. at 218. There were no intervening events—*e.g.*, a termination of the detention and the lapse of several hours or days, *see Wong Sun v. United States*, 371 U.S. at 491—separating Bostick's seizure from his consent to the search. The connection between

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[24] Respondent also maintains that the State failed to carry its burden of proving that any consent given by him was subjectively voluntary. *LoSi Sales, Inc. v. New York*, 442 U.S. 319, 329 (1979); *Schneckloth v. Bustamonte*, 412 U.S. at 233-34. By virtue of the circumstances that respondent contends amounted to a seizure, the consent was given in a highly coercive environment.

these two events therefore cannot be considered "'so attenuated as to dissipate the taint'" of the illegal detention. *Id.* at 491 (quoting *Nardone v. United States*, 308 U.S. at 341). Indeed, the State and the United States do not even argue that, if Bostick was subjected to an illegal detention, the cocaine found during the search of his bag does not have to be suppressed.

CONCLUSION

For the reasons set forth above, we submit that Bostick was seized when the police interrogated him on the bus; that the detention was unreasonable under the Fourth Amendment because it was not based on reasonable suspicion; and that Bostick's consent to the search of his luggage was tainted by the illegality of his detention. The judgment of the Florida Supreme Court should therefore be affirmed.

Respectfully submitted,

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